

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Oct 18, 2023**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TRUMAN H.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,

Defendant.

No. 2: 23-cv-00123-EFS

**ORDER REVERSING THE ALJ'S  
DENIAL OF BENEFITS, AND  
REMANDING FOR FURTHER  
PROCEEDINGS**

Due to epilepsy, non-epileptic seizures, abscess, COPD, hypertension, anxiety, depression, post-traumatic stress disorder ("PTSD"), obesity, and agoraphobia, Plaintiff Truman H. is unable to work fulltime and applied for supplemental security income benefits. He appeals the denial of benefits by the Administrative Law Judge (ALJ) on the grounds that the ALJ improperly assessed Plaintiff's credibility, the ALJ improperly analyzed the opinions of the treating

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<sup>1</sup> For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

1 medical source, and the ALJ erred in failing to make specific findings regarding  
2 Listing 11.02. As is explained below, although the ALJ did not consequentially  
3 error as to his consideration of Listing 11.02, the ALJ consequentially erred when  
4 evaluating Plaintiff's symptom reports and by failing to evaluate two medical  
5 opinions. This matter is remanded for further proceedings.

### 6 I. Background

7 In June 2020, Plaintiff filed an application for benefits under Title 16,  
8 claiming disability beginning April 28, 2020, based on the physical and mental  
9 impairments noted above.<sup>2</sup>

10 After the agency denied Plaintiff benefits, ALJ Mark Kim held a telephone  
11 hearing in December 2021 at which Plaintiff appeared with his attorney and at  
12 which Plaintiff and a vocational expert testified.<sup>3</sup> Plaintiff testified that he did not  
13 complete high school but completed 11<sup>th</sup> grade and does not have a GED.<sup>4</sup> He said  
14 that he is 5'10" and weighs 234, he is right-handed, and he lives with his girlfriend.<sup>5</sup>  
15 He stated that his neurologist retired and he has an appointment to see a new one.<sup>6</sup>

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18 <sup>2</sup> AR 234-242, 283.

19 <sup>3</sup> AR 64-86.

20 <sup>4</sup> AR 69.

21 <sup>5</sup> *Id.*

22 <sup>6</sup> AR 69-70.

1 He is treated for mental health by his physicians and last saw a counselor in 2015.<sup>7</sup>  
2 Plaintiff testified that he is treated for a skin condition called hidradenitis and has  
3 required medication and surgery.<sup>8</sup> He explained that he has three types of seizures:  
4 grand-mal seizures, myoclonic jerks and psychogenic seizures.<sup>9</sup> He said that he  
5 worst seizures are the grand-mal seizures that occur 2-3 times a week, and that he  
6 also has myoclonic jerks that cause brief muscle spasms.<sup>10</sup> He said that the seizures  
7 happen less often with medication but he cannot carry sharp or heavy objects  
8 because it is a safety risk.<sup>11</sup> He stated that when he has a grand-mal seizures he will  
9 bite his tongue and frequently injure his back and that he will be dazed, confused,  
10 and need to sleep afterward.<sup>12</sup> Plaintiff said that because of allergies he needs to  
11 breath only clean air.<sup>13</sup> He said he suffers from agoraphobia, depression and anxiety,  
12 and is anxious about his epilepsy because his uncle died from complications from  
13 epilepsy.<sup>14</sup> Plaintiff stated that medications help his depression but his anxiety is

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15 <sup>7</sup> AR 70.

16 <sup>8</sup> AR 71.

17 <sup>9</sup> *Id.*

18 <sup>10</sup> AR 72

19 <sup>11</sup> *Id.*

20 <sup>12</sup> AR 73.

21 <sup>13</sup> *Id.*

22 <sup>14</sup> AR 74.

1 harder to treat.<sup>15</sup> He explained that his agoraphobia makes it difficult to leave home  
2 and has caused him to cancel appointments.<sup>16</sup> Plaintiff testified that he elected to  
3 give up his license because the seizures made it unsafe to drive.<sup>17</sup>

4 Plaintiff testified that his neurologist said he was one of his most difficult  
5 patients to treat and that his doctors were discussing whether he might be a  
6 candidate for a brain surgery or implantation of a Vagus nerve stimulator to treat  
7 his seizures.<sup>18</sup> He said that his medications make him groggy and confused and that  
8 he cannot speak clearly after taking them.<sup>19</sup> He said that he cannot cook anything  
9 on the stove when he is alone because of past accidents when he lost consciousness.<sup>20</sup>

10 After the hearing, the ALJ issued a decision denying benefits.<sup>21</sup> The ALJ  
11 found Plaintiff's alleged symptoms were not entirely consistent with the medical  
12 evidence and the other evidence.<sup>22</sup> As to medical opinions: the ALJ found:

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14 <sup>15</sup> AR 75.

15 <sup>16</sup> *Id.*

16 <sup>17</sup> AR 76.

17 <sup>18</sup> AR 77.

18 <sup>19</sup> *Id.*

19 <sup>20</sup> AR 78.

20 <sup>21</sup> AR 13-34. Per 20 C.F.R. §§ 404.1520(a)–(g), a five-step evaluation determines  
21 whether a claimant is disabled.

22 <sup>22</sup> AR 24-26.

- 1           • The September 2020 opinions of state agency consultant Merry Alto,  
2           MD to be substantially persuasive.
- 3           • The May 2021 opinions of state agency consultant Gordon Hale, MD,  
4           to be substantially persuasive.
- 5           • The September opinions of state agency evaluator Mary Koehler, MD,  
6           to be substantially persuasive
- 7           • The May 2021 opinions of state agency evaluator Renee Eisenhauer,  
8           PsyD, to be substantially persuasive.
- 9           • The December 2021 opinions of treating neurologist David Vossler,  
10          MD, to be not persuasive.<sup>23</sup>

11 As to the sequential disability analysis, the ALJ found:

- 12           • Step one: Plaintiff had not engaged in substantial gainful activity  
13           since June 3, 2020, the application date.
- 14           • Step two: Plaintiff had the following medically determinable severe  
15           impairments: epilepsy, psychogenic non-epileptic seizures, obesity,  
16           major depression, and generalized anxiety.
- 17           • Step three: Plaintiff did not have an impairment or combination of  
18           impairments that met or medically equaled the severity of the listed  
19           impairments at 11.02 (epilepsy), 9.09 (obesity), 12.04 (depressive  
20           disorder) and 12.06 (anxiety and obsessive-compulsive disorders).

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22 <sup>23</sup> AR 26-27.  
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- RFC: Plaintiff had the RFC to perform a full range of medium work with the following exceptions:

he can lift and/or carry up to 50 pounds occasionally and 25 pounds frequently. He can stand and/or walk for about 6 hours in an 8-hour workday. He can sit for about 6 hours in an 8-hour workday. He can never climb ladders, ropes, or scaffolds. He can occasionally climb stairs. He must avoid unprotected heights and commercial vehicle driving. He should avoid more than occasional exposure to pulmonary irritants such as smoke or dust. He can perform simple, routine tasks with specific vocational preparation of 2 or less with only occasional and simple changes. He can have only occasional and superficial interaction with the public and coworkers.

- Step four: Plaintiff was not capable of performing past relevant work.
- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could perform work that existed in significant numbers in the national economy, such as an appointment clerk (DOT 237.367-010), and a cashier II (DOT 211.462-010).<sup>24</sup>

Plaintiff timely requested review of the ALJ's decision by the Appeals Council and now this Court.<sup>25</sup>

## II. Standard of Review

The ALJ's decision is reversed "only if it is not supported by substantial evidence or is based on legal error,"<sup>26</sup> and such error impacted the nondisability

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<sup>24</sup> AR 19-28.

<sup>25</sup> AR 231.

<sup>26</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). See 42 U.S.C. § 405(g).

determination.<sup>27</sup> Substantial evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>28</sup>

### III. Analysis

Plaintiff seeks relief from the denial of disability on several grounds. He argues the ALJ erred when evaluating Plaintiff’s subjective complaints, when evaluating the medical opinions, and in failing to properly evaluate whether Plaintiff’s epileptic seizures met or equaled Listing 11.02. The Commissioner argues there was no error because the ALJ properly evaluated Plaintiff’s subjective complaints, the ALJ properly evaluated the opinion evidence and determined that

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<sup>27</sup> *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) ), *superseded on other grounds by* 20 C.F.R. § 416.920(a) (recognizing that the court may not reverse an ALJ decision due to a harmless error—one that “is inconsequential to the ultimate nondisability determination”).

<sup>28</sup> *Hill*, 698 F.3d at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)). *See also* *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion,” not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such evidence was not considered[.]”).

Dr. Vossler's opinion was not consistent with the record as a whole, and that the ALJ properly considered that not all of Plaintiff's seizures were the result of epilepsy and that the record showed that after February of 2020 Plaintiff's seizures were well-controlled. The Court disagrees with the Commissioner. As is explained below, the ALJ erred in considering Dr. Vossler's opinion and in failing to consider the combination of Plaintiff's epileptic and psychogenic seizures under both Listings 11.02 and 12.00.

**A. Step Three: Plaintiff establishes consequential error as to Listing 11.02.**

*1. Plaintiff's argument*

Plaintiff contends the ALJ erred by failing to consider, beyond a cursory statement that he considered whether Plaintiff's impairments met or medically equaled Listing 11.02.

If a claimant meets all of the listing criteria, he is considered disabled at step-three. A claimant who does not meet the listing criteria may still be considered disabled at step-three if his impairment(s) medically equal a listed impairment.<sup>29</sup> Medical equivalence can be established three ways, one of which is:

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<sup>29</sup> Soc. Sec. Ruling 17-2p. *See also Sullivan v. Zebley*, 493 U.S. 521, 530 (1990) (requiring a claimant to show that the impairment meets (or medically equals) all of the specified medical criteria, not just some of the criteria).



1 If an individual has an impairment that is described in the listings,  
2 but either:

3 a. the individual does not exhibit one or more of the findings  
4 specified in the particular listing, or

5 b. the individual exhibits all of the findings, but one or more of the  
6 findings is not as severe as specified in the particular listing,

7 then we will find that his or her impairment is medically equivalent to  
8 that listing if there are other findings related to the impairment that  
9 are at least of equal medical significance to the required criteria.<sup>30</sup>

10 The ALJ is obligated to consider the relevant evidence to determine whether  
11 a claimant's impairments meet or equal one of the specified impairments set forth  
12 in the listings.<sup>31</sup> Generally, a “boilerplate finding is insufficient to support a  
13 conclusion that a claimant's impairment does not [meet or equal a  
14 listing].”<sup>32</sup> However, the ALJ need not recite the reasons for her step-three  
15 determination under the listings portion of the decision so long as the relevant  
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18 <sup>30</sup> *Id.*

19 <sup>31</sup> *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir.2001); 20 C.F.R. § 416.920(a)(4)(iii).

20 <sup>32</sup> *Lewis*, 236 F.3d at 512; *see also Marcia v. Sullivan*, 900 F.2d 172, 176 (9th  
21 Cir.1990) (noting that the ALJ's unexplained finding at step three was reversible  
22 error).

evidence and underlying findings are discussed in the ALJ's decision.<sup>33</sup> Moreover, a boilerplate finding may be appropriate where a claimant fails to set forth any evidence for the ALJ to conclude an impairment could meet or equal a listing.<sup>34</sup>

1. The Applicable Listings

Listing 11.00 states: “Epilepsy is a pattern of recurrent and unprovoked seizures that are manifestations of abnormal electrical activity in the brain. There are various types of generalized and “focal” or partial seizures. However, psychogenic nonepileptic seizures and pseudo-seizures are not epileptic seizures for the purpose of 11.02. We evaluate psychogenic seizures and pseudo-seizures under the mental disorders body system, 12.00. In adults, the most common potentially disabling seizure types are generalized tonic-clonic seizures and dyscognitive seizures (formerly complex partial seizures).”

Listing 11.02 requires:

- A. Generalized tonic-clonic seizures, occurring at least once a month for at least 3 consecutive months despite adherence to prescribed treatment.  
OR
- B. Dyscognitive seizures, occurring at least once a week for at least 3 consecutive months despite adherence to prescribed treatment.  
OR
- C. Generalized tonic-clonic seizures, occurring at least once every 2 months for at least 4 consecutive months despite adherence to prescribed treatment; and a marked limitation in one of the following:
  - 1. Physical functioning; or

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<sup>33</sup> *Lewis*, 236 F.3d at 513.

<sup>34</sup> *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990).

2. Understanding, remembering, or applying information; or
3. Interacting with others; or
4. Concentrating, persisting, or maintaining pace; or
5. Adapting or managing oneself.

OR

D. Dyscognitive seizures, occurring at least once every 2 weeks for at least 3 consecutive months despite adherence to prescribed treatment; and a marked limitation in one of the following:

1. Physical functioning; or
2. Understanding, remembering, or applying information; or
3. Interacting with others; or
4. Concentrating, persisting, or maintaining pace; or
5. Adapting or managing oneself.<sup>35</sup>

Further, the listings provide at Listing 12.00B6 that [Listing 12.07 shall be applied to evaluate] disorders [that] “are characterized by physical symptoms or deficits that are not intentionally produced or feigned, and that, following clinical investigation, cannot be fully explained by a general medical condition, another mental disorder, the direct effects of a substance, or a culturally sanctioned behavior or experience. These disorders may also be characterized by a preoccupation with having or acquiring a serious medical condition that has not been identified or diagnosed. Symptoms and signs may include, but are not limited to, pain and other abnormalities of sensation, gastrointestinal symptoms, fatigue, a high level of anxiety about personal health status, abnormal motor

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<sup>35</sup> 20 C.F.R. pt. 404, subpt. P, app. 1, Listing 11.02 (citations omitted).

1 movement, pseudo-seizures, and pseudo-neurological symptoms, such as  
 2 blindness or deafness.”

3 Listing 12.07 provides the following:

4 **Somatic symptom and related disorders (see 12.00B6), satisfied by**  
 5 **A and B:**

6 A. Medical documentation of one or more of the following:

- 7 1. Symptoms of altered voluntary motor or sensory function that  
 8 are not better explained by another medical or mental  
 9 disorder;
- 10 2. One or more somatic symptoms that are distressing, with  
 11 excessive thoughts, feelings, or behaviors related to the  
 12 symptoms; or
- 13 3. Preoccupation with having or acquiring a serious illness  
 14 without significant symptoms present.

15 AND

16 B. Extreme limitation of one, or marked limitation of two, of the  
 17 following areas of mental functioning (see 12.00F):

- 18 1. Understand, remember, or apply information (see 12.00E1).
- 19 2. Interact with others (see 12.00E2).
- 20 3. Concentrate, persist, or maintain pace (see 12.00E3).
- 21 4. Adapt or manage oneself (see 12.00E4).

22 The ALJ failed to articulate his reasoning as to Listing 11.02 and rather  
 23 made the following a cursory statement: “The undersigned considered listing 11.02  
 (epilepsy).”<sup>36</sup> Moreover, the ALJ failed to articulate whether he considered  
 whether Plaintiff’s pseudo-seizures met or equaled Listing 12.07. But the court  
 finds that there is no consequential error resulting from the ALJ’s failure.

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<sup>36</sup> AR 21.

1           The Commissioner argues that the ALJ's findings at Step Two that Dr.  
2 Vossler stated in his treatment notes of October of 2021 that Plaintiff's "various  
3 seizures need to be sorted out" provides support for his reasoning.<sup>37</sup> The  
4 Commissioner then notes that the ALJ also considered notes in the medical record  
5 which indicated that "Plaintiff's type of epilepsy was not clear due to conflicting EEG  
6 results and evidence of non-epileptic seizures."<sup>38</sup>

7           The record is clear that Plaintiff suffers from epilepsy. This was established  
8 according to Dr. Vossler by an EEG in 2016 which showed independent  
9 frontotemporal lobe activity, left greater than right, which is indicative of epilepsy  
10 and on which his diagnosis was based.<sup>39</sup> However, in 2018, during a sleep study,  
11 Plaintiff was noted to have episodes of reported tongue biting while sleeping which  
12 did not show abnormal brain activity, thereby indicating additional pseudo-seizures  
13 which were discogenic nature.<sup>40</sup> Additionally, a four-day EEG study performed in  
14 2017 showed that on one night Plaintiff experienced four episodes of full or partial  
15 seizure for which the EEG reflected epileptiform morphology and that on another  
16 night he experienced one such episode, which again established that Plaintiff

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19 <sup>37</sup> ECF 11 at 4-5, quoting AR 20.

20 <sup>38</sup> ECF 11 at 5, quoting AR 19.

21 <sup>39</sup> AR 751.

22 <sup>40</sup> *Id.*

1 suffered from epileptic seizures.<sup>41</sup> But during the 2017 study, there were also a  
2 number of episodes experienced by Plaintiff of twitching, leg jerking, and brief states  
3 of altered awareness during the night that occurred without epileptiform  
4 morphology and which were non-epileptic and presumably discogenic in nature.<sup>42</sup>

5 The ALJ made a specific finding in the record at step two that Plaintiff had  
6 mild limitations in the domain of understanding, remembering or applying  
7 information and a moderate limitation in the domains of interacting with others;  
8 concentrating, persisting or maintaining pace; and adapting or managing oneself.<sup>43</sup>  
9 Thus, the Plaintiff's limitations did not meet the B criteria necessary to meet or  
10 equal Listing 12.07. That would consequently mean that only the seizures suffered  
11 by Plaintiff which were epileptic in nature were able to be considered as sufficient to  
12 meet or equal a listing.

## 13 2. Summary

14 Because it was the statement of Dr. Vossler that it was not yet determined  
15 whether the nocturnal seizures which Plaintiff suffered were epileptic or discogenic  
16 in nature, it is not possible to credit that each such seizure suffered is properly  
17 counted as a seizure to be considered for the purposes of meeting Listing 11.02.  
18 Therefore, the ALJ's determination that Plaintiff's seizures do not meet or equal  
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20 <sup>41</sup> *Id.*

21 <sup>42</sup> *Id.*

22 <sup>43</sup> AR 22.

1 Listing 11.02 is supported by substantial evidence. The Court will not remand as to  
2 this issue.

3 **B. Medical Opinions: Plaintiff established consequential error.**

4 Plaintiff challenges the ALJ's evaluation of Dr. Vossler's treating opinion.  
5 As discussed below, because the ALJ failed to provide legitimate reasons supported  
6 by substantial evidence to find Dr. Vossler's opinion not persuasive, the ALJ has  
7 erred.

8 1. Standard<sup>44</sup>

9 An ALJ must consider and evaluate the persuasiveness of all medical  
10 opinions.<sup>45</sup> The factors for evaluating the persuasiveness of medical opinions include,  
11 but are not limited to, supportability, consistency, relationship with the claimant,  
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21 <sup>44</sup> 20 C.F.R. § 416.920c.

22 <sup>45</sup> *Id.* § 416.920c(a), (b).  
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1 and specialization.<sup>46</sup> Supportability and consistency are the most important factors,  
2 and the ALJ is required to explain how both of these factors were considered.<sup>47</sup>

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4       2.     Dr. Vossler's opinions

5       Plaintiff presented to Dr. Vossler at Valley Medical Center Epilepsy Clinic  
6 on July 7, 2020, upon a referral from her neurologist Dr. Nievara.<sup>48</sup> Plaintiff  
7 presented with the intractable spells of nocturnal shaking with tongue biting, and  
8 diurnal muscle twitches which were nonepileptic and epileptic in nature and was  
9 referred for consultation for surgery.<sup>49</sup> Dr. Vossler diagnosed Plaintiff with  
10 epilepsy with altered consciousness with intractable epilepsy, abnormal EEG, and  
11 epilepsy undetermined as to focal or generalized, intractable.<sup>50</sup> Dr. Vossler further  
12 noted that it was unclear what type of epilepsy Plaintiff had and reasoned that  
13 while it would be helpful to obtain additional EEG testing, he indicated that it was  
14 not clear what type of epilepsy Plaintiff suffered from and that he felt it would be  
15 best to try a different antiepileptic drug before administering another EEG or  
16 recommending surgery.<sup>51</sup> Dr. Vossler then prescribed a new antiepileptic and  
17 advised Plaintiff to return in 3 months for follow-up.<sup>52</sup> Plaintiff returned in three  
18 months for his follow-up appointment with Dr. Vossler and his medications were  
19 changed further.

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<sup>46</sup> *Id.* § 416.920c(c)(1)–(5). When assessing the medical source's relationship with  
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12 the claimant, the ALJ is to consider the treatment length, frequency, purpose, and  
13 extent, and whether an examination was conducted. The ALJ may also consider  
14 whether the medical source has familiarity with the other record evidence or an  
15 understanding of the disability program's policies and evidentiary requirements.

16 *Id.* § 416.1520(c)(5).

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18 <sup>47</sup> *Id.* § 416.920c(b)(2), (c)(1)–(2).

19 <sup>48</sup> AR 430.

20 <sup>49</sup> *Id.*

21 <sup>50</sup> AR 434.

22 <sup>51</sup> AR 434-435.

23 <sup>52</sup> *Id.*

1 On December 30, 2021, after having treated Plaintiff since July 7, 2020, Dr.  
2 Vossler completed a medical source statement regarding Plaintiff's physical  
3 limitations.<sup>53</sup> Dr. Vossler stated that he last saw Plaintiff on October 1, 2021, and  
4 was no longer seeing him; that he suffered from a mixture of probably epileptic  
5 seizures and psychogenic seizures, and that seizures was his primary symptom.<sup>54</sup>  
6 Dr. Vossler indicated that Plaintiff had on average 1 or 2 seizures per week which  
7 lasted for 1-2 minutes each with no warning, and that postictal symptoms included  
8 bitten tongue, muscle aches, sleepiness, and anger.<sup>55</sup> Dr. Vossler stated that during  
9 and immediately after seizures Plaintiff would need to put something soft under his  
10 head, remove his glasses, loosen tight clothing, clear the area of hard or sharp  
11 objects, and turn on his side to allow saliva to drain from his mouth.<sup>56</sup> Dr. Vossler  
12 stated that Plaintiff was compliant with his medication and would have expected  
13 side effects from his medications.<sup>57</sup> Dr. Vossler opined that Plaintiff had at least one  
14 tonic-clonic seizure per month and at least one dyscognitive seizure per week, and  
15 further opined that Plaintiff had marked limitations in the four domains comprising  
16 the B criteria of Listing 12.07.<sup>58</sup> Dr. Vossler opined that Plaintiff would be off-task  
17 for 20% of an average work week and be absent on average for 8-12 hours a week.<sup>59</sup>

18 The ALJ discounted Dr. Vossler's opinion because 1) his opinion appeared to  
19 be based on subjective reporting and speculation, 2) it was not consistent with  
20 medical records which showed that Plaintiff's medication regimen was successful in  
21 cutting his seizure activity in half by August 2020, and 3) Plaintiff failed to follow-  
22 up with diagnostic testing.<sup>60</sup>

1 First, it is unclear why the ALJ reasoned that Dr. Vossler based his opinion  
 2 on subjective reports. Dr. Vossler's medical notes indicate that he based his  
 3 diagnosis and treatment heavily on the results of three separate EEG studies  
 4 which were performed in 2016, 2017, and 2020 and which documented the fact that  
 5 Plaintiff suffered from seizures while sleeping.<sup>61</sup> Indeed, there was ample objective  
 6 medical documentation that Plaintiff suffered seizures, and the only issue in  
 7 question was whether the seizures were epileptiform or discogenic.<sup>62</sup>

8 Turning to the second reason (that Dr. Vossler's opinion was contrary to  
 9 medical notes that Plaintiff's medications were more successful in controlling his  
 10 seizures after August 2020) a comprehensive review of the medical records reveals  
 11 that the ALJ failed to consider the statement that Plaintiff's seizures were "well  
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13 <sup>53</sup> AR 759-762.

14 <sup>54</sup> *Id.*

15 <sup>55</sup> AR 760.

16 <sup>56</sup> *Id.*

17 <sup>57</sup> *Id.*

18 <sup>58</sup> AR 761.

19 <sup>59</sup> AR 762.

20 <sup>60</sup> AR 27.

21 <sup>61</sup> AR 430, 434, 751.

22 <sup>62</sup> AR 751.

1 controlled” in their medical context.<sup>60</sup> Plaintiff’s medical history reflects that he  
2 previously experienced up to four or five seizures a week and only experienced one  
3 to two seizures with better control. Clearly, the seizure medication reduced the  
4 severity and frequency of Plaintiff’s seizures. However, the medical records reveal  
5 that he continued to have some severe and some minor seizures on a consistent  
6 basis.

7 On August 2, 2012, Plaintiff presented to Lynette Mc Canna ARNP for a  
8 follow-up regarding anxiety and stated that on Escitalopram his anxiety was  
9 improved but that he was having worsening of his tonic movements over the last  
10 year and questioned if the medication caused it.<sup>63</sup> ARNP McCanna and Dr.  
11 McIntee diagnosed anxiety disorder and temporal lobe epilepsy.<sup>64</sup> ARNP McCanna  
12 noted a significant improvement in Plaintiff’s agoraphobia.<sup>65</sup> On August 31, 2021,  
13 Plaintiff presented to ARNP McKanna and she noted that Plaintiff had a history of  
14 epilepsy which was not well-controlled. <sup>66</sup>

15 On October 1, 2021, Plaintiff presented to Dr. Vossler for follow-up.<sup>67</sup> Dr.  
16 Vossler noted that Plaintiff had his medications changed due to daytime

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18 <sup>63</sup> AR 716.

19 <sup>64</sup> AR 719.

20 <sup>65</sup> AR 721.

21 <sup>66</sup> AR 711.

22 <sup>67</sup> AR 750.

1 drowsiness but was functioning tolerably well. Dr. Vossler noted that Plaintiff was  
2 having 1-2 grand-mal seizures per week rather than 3-5 per week and that he also  
3 suffered from myoclonic jerks which caused him to drop objects.<sup>68</sup> Dr. Vossler noted  
4 that an EEG performed in 2016 indicated epilepsy and that an EEG performed in  
5 2017 and 2018 indicated the presence of additional non-epileptic seizures.<sup>69</sup> Dr.  
6 Vossler noted that in postictal state for his epileptic seizures (type A) Plaintiff was  
7 lethargic and that in his postictal state for myoclonic spasms/jerks Plaintiff needed  
8 to nap.<sup>70</sup> These treatment notes, written in the latter months of treatment prior to  
9 the hearing, clearly establish that with his new medication Plaintiff's seizures were  
10 much better controlled but remained, as ARNP McCanna noted, not well-  
11 controlled. Thus, the records do not support the ALJ's reasoning that Dr. Vossler's  
12 opinions were inconsistent with improvements in Plaintiff's condition.

13 The ALJ's third reason for discounting Dr. Vossler's opinion (that Plaintiff  
14 failed to follow up on recommended testing) is also unpersuasive. While the ALJ  
15 states that Plaintiff was noncompliant with treatment, Dr. Vossler expressly stated  
16 that Plaintiff complied with treatment requests.<sup>71</sup> Moreover, the only statement  
17 made by Dr. Vossler, that an EEG was not performed in 2020, as he had requested  
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19 <sup>68</sup> *Id.*

20 <sup>69</sup> AR 751.

21 <sup>70</sup> AR 751-752.

22 <sup>71</sup> AR 760.

1 does not indicate that the failure for the test to be performed was due in any part  
2 to an action or inaction attributable to Plaintiff. Notably, in 2020 the Covid-19  
3 pandemic resulted in limitations in both medical testing and medical treatment.  
4 The record shows, at any rate, that the EEG testing was in fact performed later in  
5 2020.

6 To the extent that the Commissioner raised a separate issue not articulated  
7 by the ALJ that the record contained conflicting information regarding the type of  
8 seizures suffered by Plaintiff, the Court disagrees. The Commissioner's argument  
9 errs in that it articulates considerations not made by the ALJ. Additionally, it  
10 displays a misunderstanding of the Plaintiff's medical record in particular and in  
11 the nature of seizures in general. Moreover, the Commissioner's argument that the  
12 ALJ's finding is supported by a perceived ambiguity in the record is problematic  
13 because if such an ambiguity existed, the ALJ was obligated to develop the record  
14 further. But the Court disagrees that the record is ambiguous. The record  
15 indicates that Plaintiff suffers from a combination of both epileptic seizures and  
16 non-epileptic (discogenic) seizures. There is no opinion from any medical source  
17 which controverts the diagnosis by Dr. Vossler and other treating sources that  
18 Plaintiff suffers from epilepsy. The fact that Plaintiff also suffers from discogenic  
19 seizures in no way conflicts with the objective testing which supports Plaintiff's  
20 diagnosis of epilepsy and the differing types or seizures are in no way mutually  
21 exclusive. More importantly, while discogenic seizures cannot be considered for  
22 purposes of analyzing whether Plaintiff meets a listing, they must be considered as

1 to the limitations they cause in Plaintiff's ability to function. Dr. Vossler's  
2 statement that Plaintiff suffers seizures 1 or 2 times a week is consistent with the  
3 record as a whole.

4 Therefore, on this record, without more meaningful analysis, the ALJ's  
5 finding that Mr. Vossler's opinion is unsupported by the record is not a rational  
6 finding supported by substantial evidence. This error is consequential because if  
7 the RFC incorporated Mr. Vossler's opined pace and absenteeism limitations,  
8 Plaintiff would be unable to sustain work.

9 3. Summary

10 The ALJ erred when considering the medical opinions of Dr. Vossler. This  
11 error was consequential as Dr. Vossler opined that Plaintiff was unable to  
12 sustain workplace pace and attendance. Because remand is required due to this  
13 error, and because the Court has found that credible objective evidence supports  
14 the fact that Plaintiff suffers from tonic-clonic seizures, the Court need not  
15 separately address Plaintiff's argument that the ALJ erred in assessing the  
16 credibility of his subjective complaints.

17 **C. Remand: Further proceedings are needed**

18 Plaintiff submits a remand for payment of benefits is warranted.

19 A district court "ordinarily must remand to the agency for further  
20 proceedings before directing an award of benefits."<sup>72</sup> The "credit-as-true" rule, on  
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22 <sup>72</sup> *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017).

1 which Plaintiff relies, is a “rare and prophylactic exception to the ordinary  
2 remand rule.”<sup>73</sup> For the Court to remand for award of benefits, three conditions  
3 must be satisfied:

4 (1) the record has been fully developed and further administrative  
5 proceedings would serve no useful purpose; (2) the ALJ has failed to  
6 provide legally sufficient reasons for rejecting evidence, whether  
7 claimant testimony or medical opinion; and (3) if the improperly  
8 discredited evidence were credited as true, the ALJ would be required  
9 to find the claimant disabled on remand.<sup>74</sup>

10 Here, the third condition is met. The ALJ failed to provide sufficient reasons  
11 for rejecting Dr. Vossler’s opinion. However, further administrative proceedings  
12 are necessary. Although the record reflects that Plaintiff will be absent or off-task  
13 due to seizures it is not clear to what extent her ability to maintain pace or  
14 attendance will be impacted. Therefore, the Court finds that further development  
15 is necessary for a proper disability determination. Here, it is not clear what, if any,  
16 additional limitations are to be added to the RFC. While Dr. Vossler is an expert  
17 and his opinions should be given deference, the record is complex and involves  
18 matters that seem to require additional explanation from a qualified medical  
19 source. Therefore, the ALJ should consider whether testimony should be received  
20 from a medical expert pertaining to Plaintiff’s epileptic and discogenic seizures,

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21 <sup>73</sup> *Id.*

22 <sup>74</sup> *Garrison v Colvin*, 759 F.3d 995, 1020 (9<sup>th</sup> Cir. 2014).



1 and then consider any additional evidence presented, and make findings at each of  
2 the five steps of the sequential evaluation process.

3 **IV. Conclusion**

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. The ALJ's nondisability decision is **REVERSED**, and this matter is  
6 **REMANDED** to the Commissioner of Social Security for further  
7 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).  
8 2. The Clerk's Office shall **TERM** the parties' briefs, **ECF Nos. 9, 11**  
9 **and 12**, enter **JUDGMENT** in favor of **Plaintiff**, and **CLOSE** the  
10 case.

11 IT IS SO ORDERED. The Clerk's Office is directed to file this order and  
12 provide copies to all counsel.

13 DATED this 18<sup>th</sup> day of October, 2023.

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EDWARD F. SHEA  
16 Senior United States District Judge  
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